I think, therefore, the defendant is entitled to set off the sum of $805 overpaid by him between April, 1946, and February, 1948, against the sum of $1,015 the rent for the months of March, 1948, to July, 1950. There leaves a sum of $210 for which there must be judgment for the plaintiffs.

I propose to hear argument as to costs.

Order accordingly.

HAJI OSMAN BIN ABU BAKAR v. SAIYED NOOR BIN SAIYED MOHAMED.

[Orig. Civil Juris. (Hastings, J.) June 21, 1951]

[Ipoh — Civil Suit No. 379 of 1950]

Land Code (Cap. 138) s. 85(ii) — Registration of transfer owing to the death of the transferor — Remedy.

When by reason of the provisions of section 85(ii) of the Land Code a transfer cannot be registered owing to the death of the transferor before presentment, the transferee is not entitled to an order for specific performance of the contract since this is no act remaining to be done on the part of the transferor. The transferee is entitled only to the return of the purchase price and is not entitled to call for a part transfer by the representative of the deceased.

Semble: The only duty on the part of a transferor who has performed the whole of the contract is not to hinder or prevent registration.

CIVIL SUIT.

K. C. Chan for the plaintiff.

J. D. M. Donnelly for the defendant.

The facts and arugments appear sufficiently from the judgment.

Cur. Adv. Vult.

Hastings, J. : — The facts of this case are that on the 25th of September, 1944, one Saiyed Mahamud bin Saiyed Pandak who died on 11th of July, 1949, sold a registered share in the land held under Perak Grant for Land No: 15596 to the plaintiff for the sum of $2,250. The purchase price was paid in Japanese currency, the transfer was executed by both parties before the Collector of Land Revenue at Kuala Kangsar and handed to the plaintiff by the transferor together with the title to the land. This title is still in the possession of the plaintiff. This transfer was not presented at the Land Office during the occupation period. It was not presented in fact until October 25th, 1949, that is to say, until after the death of the transferor. Whether it could have been presented during the Moratorium period depends on whether it was a dealing within the meaning of clause 8 of the Moratorium Proclamation. In my opinion it was not since this dealing had taken place during the occupation period. I am fortified in this view by the wording of section 24 of the Titles to Land (Occupation Period) Ordinance, No. 39 of 1949, which directs the Registrar to register documents executed during the occupation period which have been presented since the expiration of such period. If such documents could not be presented it is difficult to understand what this can apply to. I do not, however, regard this as a matter of any importance as the question for decision would arise if the transferor had died at any time subsequent to the execution of the transfer. The facts in this case together with the provisions of the Land Code call for a decision on a question of general importance in Registration Law.

By the provisions of section 85(ii) of the Land Code, Cap. 138,

> "The death of any person prior to the presentation of any instrument executed by him shall prevail so as to prohibit the registration of such instrument, and such instrument if registered shall be void."

I have searched the textbooks dealing with land registration under the *Torrens System,* namely, "Registration of Titles to Land throughout the Empire" by James Edward Hogg, the same author's "Deeds Registration in Australia", "The Australian Land Titles (*Torrens System*)" by Donald Kerr and "The Transfer of Land" by J. H. Dallas Wiseman, a book dealing with the laws of Victoria, and it is clear to me that this provision is something peculiar to the law of this country. The usual principle of Land Registration Law is that the death of a party to an instrument does not prevent the registration of that instrument. This is in accordance with the ordinary principle of Conveyancing Law. I do not know why this provision was introduced but since it is there it is necessary to give effect to it. Further, there was no such provision in the land legislation of this country prior to 1926 and it must be presumed that this change was intended to have some effect. If, as the plaintiff contends, the only result of this change in the law was to compel the transferee to bring a suit to acquire a new transfer which he could present for registration and so to place himself in the same position as he would have been in before the alteration of the law, it appears to be difficult to understand why this legislation should have enacted the change.

The plaintiff claims against the administrator of the transferor specific performance of the agreement of Septembr 25th, 1944, or in the alternative the return of the $2,250 paid. I shall deal with the latter claim later in this judgment. The stress of the plaintiff's claim was for specific performance. The counsel

for the plaintiff claimed that the Court should make an order directing the administrator to apply to the Court for leave to sell the land and for an order, I presume assuming that the leave was granted, that he should execute a new registrable transfer of the land.

It appears to me apart from any other consideration that there must be a difficulty in passing a decree compelling an administrator to apply to Court for such an order. There is no evidence as to the beneficiaries in this case, but in some cases it would be clear to the Court on the application that the sale would not be in the interest of the beneficiaries some of whom might be minors. That does not, however, to my mind contribute the greatest difficulty in the way of an order decreeing specific performance. By section 11 of the Specific Relief (Malay States) Ordinance, No. 29 of 1950, specific performance of any contract may be enforced in the discretion of the Court in the case of certain contracts and then follows headings each one of which contains the words "act agreed to be done". Specific performance is a relief granted when a party to a contract has failed to perform all or part of that contract. When the plaintiff left him on September 25th, 1944, the transferor had performed his agreement. He had accepted the purchase price, signed a registrable transfer and handed over to the plaintiff the title deed of the land. The only thing therefore that remained to complete the transaction was for the plaintiff to present the transfer for registration. In my opinion it is clear that at that moment the plaintiff could not have brought a suit for specific performance against the transferor for the simple reason that the transferor had performed his contract in all respects.

Mr. Donnelly argued for the plaintiff that this was not so. He contended that in the case of every transfer of land the transferor impliedly undertook to complete the registration, that the title did not pass until registration and that therefore the contract could not be completed until registration had taken place. He cited in support of this proposition a passage from Mr. Wiseman's book, "The Transfer of Land" at page 411. The passage is as follows:—

> "It is the duty of the vendor who is registered as proprietor to procure the registration of a transfer executed by him because otherwise he does not do all he should do to vest the estate in the transferee."

This is, I think, a citation from the case mentioned there. The book deals with the law of the State of Victoria only and a reference to the section No. 248, which is the section under discussion, shows that there is no similar section in our Code; that section gives the transferor the right and, as I understand, he is the only person who has that right, to bring the Registrar before the Court if he refuses registration of an instrument. No doubt it would be the duty of the vendor to take action under such legislation but if registration is refused in this country the purchaser can himself take action under section 237 of the Code. I may add that it is clear from a passage on page 72 of Mr. Wiseman's book that in Victoria the death of the transferor would not prevent registration. Mr. Donnelly further argued that the vendor was a trustee for the purchaser. No doubt he is, but a trustee of the land until possession passes. I have no doubt that when the plaintiff went away with the transfer and the title he had legal possession. No doubt the land which was rubber land was not tapped by anyone in those days. It is true that in 1948 the vendor or someone on his behalf appears to have forbidden the plaintiff access to the land, and if the plaintiff had ever become the registered owner it might be that he could have claimed the profits for that period, but I do not think that that enables him to claim that the present defendant should take all steps necessary to place the plaintiff on the register. As I have said, this case raises the question as to what is the position when the transferor dies before registration is effected. The Code says the transfer cannot be registered. The legislature has chosen to enact something other than the ordinary law on the point and it seems to me that the only conclusion is that the only remedy which the transferee has if the legal representative of the deceased will not obtain the leave of the Court, if he can, and then execute a new transfer, is to claim the return of the purchase price. In other words, the death of the transferor prevents the completion of the registration. This would appear to be what the legislation intended. I am not concerned with the merits of this policy. But since in the Malay States an administrator cannot transfer without leave of the Court it may have been considered that it was a question for the Court to consider whether or not the contract should be carried into effect.

Mr. Donnelly had a further argument. He pointed out that the wording of section 110 of the Code implies that both parties shall execute the transfer "and shall present the same". I do not think these words imply that the transferor covenants to effect registration.

In my opinion the extent of the duty of the transferor once he has executed the transfer and handed over the title is that he should do nothing to hinder registration.

Mr. Donnelly cited also a passage from Mr. Kerr's "Australian Land Titles (*Torrens System*)" page 129 para. 246 :—

> "An instrument in statutory form until registration operates as a contract **inter partes**. In this respect it stands on the same footing as a document, which, owing to its being in a form which will not be accepted by the Registrar, is incapable of registration. The mere execution of a registrable instrument transfers no interest in the land, but merely gives a right **in personam**."

Most of the paragraph is recognised law but it is no authority for the proposition that a person who has done all he is required to do under a contract can be required to do it all over again without there being any implied covenant that he should do so. With great respect to the learned author, I cannot agree that a registrable transfer and an unregistrable transfer are on the same footing. No doubt each may constitute evidence of contract but in the case of the unregistrable transfer the transferor has not performed his contract which is to give a registrable contract.

There is one other section relevant to this matter which was not mentioned in argument by either party. Section 158 of the Code enacts that the representative shall hold the land subject to any trusts which the deceased proprietor held the same. In my opinion a transferor who has handed over transfer title and possession to the transferee does not hold the land under any trust. His only duty as I have said is to do nothing to prevent or assist in preventing registration of the transfer. The law in fact has provided that the transfer which the deceased had executed shall not be registered and if registered shall be void. It seems difficult to suppose that it is his duty to insure that another transfer shall be placed on the register.

It follows from this that the claim for specific performance, that is to say, for an order that the administrator applies to Court and then with leave of the Court execute a new transfer, fails.

In my opinion, on the death of the vendor the contract came to an end and the plaintiff became entitled to recover the money he had paid as on a failure of consideration. When the purchaser paid the consideration he paid the sum of $2,250 in Japanese currency. Legislation passed since the re-occupation of Malaya has enacted that the real value of the sum paid on that day was $160.71. The counsel for the plaintiff has argued that the amount which the plaintiff can recover is the $2,250 Malayan currency. He contends that the debt did not arise until the death of the vendor and that it is therefore not an occupation debt. An "occupation debt" is defined in the Ordinance as a debt payable by virtue of an obligation incurred during the occupation period and accruing due at any time. This debt is payable by virtue of an obligation incurred during the occupation period, namely, the obligation to refund the purchase price paid on September 25th, 1944, if there was a failure of consideration of the agreement entered into on that day. It is therefore an occupation debt and falls to be revalued. The definition makes it clear that the debt may accrue at any time. This debt did not accrue until after the end of the occupation period, but it is nevertheless an occupation debt.

The counsel for the defendant argued that the amount the plaintiff could recover was nil by reason of the fact that this debt had not been demanded before the 12th of August, 1945, that therefore under section 6 of the Debtor and Creditor Ordinance it should be revalued as on that date and he cited an unreported case in support of this proposition.

In my opinion the contention and effect of that section is to render all debts due and payable in the occupation period which are not payable under a time essence contract liable to revaluation as expressed in that section. I am at a loss to understand how this debt could have been demanded at any date prior to the 12th day of August, 1945, and therefore I do not think that part of the section applies to the facts of this case. In my opinion the debt should be revalued at $160.71 which appear to me to be the just and equitable figure as based on the scale. Though this decision may seem hard on the plaintiff in this case, I may point out that except for the extraordinary circumstances of the occupation the result in law would not be unjust. If the transferor dies before presentation the transfer can take place if the parties wish it and it is for the benefit of the estate, and if it does not the purchaser recovers the whole of the purchase price. He does this theoretically in this case but owing to the revaluation scale paying little regard to the price of land during the occupation the revalued amount is no doubt less than the value of the land at the time of the sale.

The defendant has paid into Court the sum of $243.37 and his plea may be taken as an admission that that sum is due.

I give judgment for the plaintiff for that sum with costs on the lower Court scale up to the date of payment in and costs to the defendant on the High Court scale as from the date of payment in.

Order accordingly.